U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 17 March 2005

BALCA Case No.: 2004-INA-56
ETA Case No.: P2002-CA-09522076

In the Matter of:

PICK UP STIX RESTAURANT,
Employer,

on behalf of

MARTIN OCAMPO-ACOSTA,
Alien.

Appearance: Susan M. Jeanette, Esquire
Del Mar, California
For the Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Martin Ocampo-Acosta ("Alien") filed by Pick Up Stix Restaurant ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part

656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26. The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On July 20, 2001, the Employer, Pick Up Stix Restaurant, filed an application for labor certification to enable the Alien, Martin Ocampo-Acosta, to fill the position of Cook, Restaurant. (AF 45). The primary job requirement was two years of experience in the job offered. Furthermore, under "Other Special Requirements," the Employer noted: "Foodhandler's card required, if hired." The total hours per week was listed as 40, with a daily work schedule from 10:00 a.m. to 6:30 p.m. The rate of pay was listed as $11.59 per hour. Under "Overtime," the Employer listed "0." (AF 45).

In a Notice of Findings ("NOF") issued on July 21, 2003, the CO proposed to deny certification on the grounds that the Employer's test of the labor market was inconsistent and insufficient, and not in compliance with 20 C.F.R. §656.21(g)(1) – (9) and/or §656.20(g). The CO also found that the Employer's failure to offer overtime was improper, and in violation of 20 C.F.R. §656.20(c)(7). The Employer submitted its rebuttal on or about July 29, 2003. (AF 34-40). The CO found the rebuttal unpersuasive and issued a Final Determination, dated September 9, 2003, denying certification on the above-stated grounds. (AF 32-33). On or about October 7, 2003, the "Employer's Request for Reconsideration and/or Appeal to the Board of Alien Labor Certification Appeals" was filed. (AF 1-31). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals. Following the issuance of a "Notice of Docketing and Order Requiring Statement of Position or Legal Brief, dated February 24, 2004, Employer filed a brief in support of its appeal.

DISCUSSION

In the NOF, the CO stated that Employer's web-site "informs U.S. workers interested in employment to stop by between 2:00 p.m. and 5:00 p.m.," while the newspaper advertisements placed by Employer instructed U.S. workers that they may only send their resumes and reference letters, and expressly stated that they should not drop in or make phone contact. The CO stated that such action indicates a lack of good faith recruitment and that the advertisement discourages qualified U.S. workers. (AF 42; *see also* AF 51-54). In addition, the CO stated that "the Help Wanted notice that employer attested posting in a conspicuous location in each of its Pick Up Stix Restaurants shows an hourly work schedule of 2:00 p.m. to 10:30 p.m. which does not agree with the job offer's hourly work schedule of 10:00 a.m. to 6:30 p.m. The various other postings are illegible and do not appear to contain the full description and required statements of 20 CFR 656.20(g). Due to these inconsistencies and deficiencies,[[1]] mandatory recruitment efforts must be made."[2] (AF 42). Accordingly, the CO instructed the Employer to take the following corrective action:

> The employer is to perform mandatory recruitment efforts, as required by 20 CFR 656.21(g)(1) through (9), and post notice of the job opportunity, as required by 20 CFR 656.20(g).
>
> In addition, the employer must state that it is willing to perform mandatory recruitment efforts, as directed in this notice. Failure to indicate willingness to advertise will result in a denial of the employer's application. The employer should also submit a draft advertisement.
>
> After receiving the employer's statement of willingness to perform mandatory recruitment efforts and draft advertisement, this office will return the application to the Employment Service. The Employment Service will contact the employer with recruitment instructions.

[1] Although not the basis for this decision, our review of the Appeal File indicates that the CO may have confused website listings of other restaurants with those by this Employer. (AF 57-59). Furthermore, the "Help Wanted notice" cited in the NOF is either not in the Appeal File or it is one of the illegible "Job Listings/Bulletins." (AF 60-68).

[2] The application was filed with a request for reduction in recruitment ("RIR") processing. The CO denied the RIR request on January 10, 2003. (AF 84)

> **However, do not make any recruitment efforts until the Employment Service advised the employer to do so.**

(AF 42). (Emphasis in original).

The other deficiency cited in the NOF relates to Employer's failure to offer overtime. (AF 42-43). To cure this deficiency, the CO directed the Employer to take the following corrective action:

> An amendment to the job offer must be submitted, in duplicate, dated and bearing the original signatures of the employer, guaranteeing the overtime payment rate of one and one-half times the basic rate of $11.59 per hour, OR a rebuttal must be submitted showing that it is not customary nor legally required to pay overtime in the occupation in question, 20 CFR 656 20(c)(7).

(AF 43).

In its rebuttal, the Employer expressed a willingness to retest the labor market, as directed in the NOF. Furthermore, the Employer submitted the following draft advertisement:

> COOK – prepare wide range of menu items. Use, operate standard rest. equipment, appliances, utensils. 40hr/wk. 10:00A – 6:30P. $11.59hr. Overtime at $17.39hr. No over time allowed. 2 yrs. exp. Food handler's card required, if hired. Job site/interview San Diego. Send ad, resume/letter of qual. To Job #_____ PO Box 269065, Sacto CA 95826-9065.

(AF 25). In addition, the Employer provided the following "corrective action" regarding the overtime issue:

> As per the ETA 750A, Item 12b, there is no over time indicated, as we do not allow our workers work over time. Each worker has a strict forty (40) hours per week policy. This issue has always been a non-issue. If this I a new policy that employers have to offer over time, please amend the form ETA 750A, Item 12b to read $17.39 an hour (no over time allowed).

(AF 25).

In the Final Determination, the CO stated, in pertinent part:

> The employer's rebuttal is not persuasive and does not satisfactorily rebut the NOF. Although the employer has indicated its willingness to retest the labor market, we cannot allow the application to enter into a new recruitment phase due to the conditional statement offering overtime pay. The NOF required employer to guarantee the overtime pay or to show it is not customary or legally required to pay overtime for a cook. Employer does not allow its workers to work overtime as they are held to a strict forty hours per week. According to the employer, overtime has never been an issue and that if this is a new policy for employers, then overtime is offered even though this employer will not allow any overtime hours to be worked. This is unacceptable. The overtime pay must be guaranteed. Employer failed to comply, not only with the NOF, but with 20 CFR 656.20(c)(7). Labor certification must be denied.

(AF 33).

In "Employer's Request for Reconsideration and/or Appeal to the Board of Alien Labor certification Appeals" (AF 1-6), Employer argued that it had successfully rebutted the CO's findings and that the CO's Final Determination is incorrect.

Upon review, we find merit in Employer's argument. In its rebuttal, the Employer clearly and unequivocally expressed a willingness to perform the mandatory recruitment, as directed in the NOF. Furthermore, the Employer provided a draft advertisement as requested by the CO. Accordingly, the CO's only basis for denying certification, as stated in the Final Determination, was the Employer's purported failure to "guarantee" overtime pay. However, as outlined above, the Employer, in fact, agreed to pay $17.39 per hour (*i.e.,* 1 ½ times the basic rate of $11.59/hr) for overtime. Furthermore, the Employer included the overtime rate in the draft advertisement, and authorized that the ETA 750A form be amended to reflect overtime pay at $17.39 an hour. (AF 35). Nevertheless, the CO found the foregoing unsatisfactory and contrary to

the provisions of 20 C.F.R. §656.20(c)(7), because the Employer reiterated that its workers are held to a strict 40-hour work week, which makes overtime a non-issue.

> Section 656.20(c)(7) states:
>
> (c) Job offers filed on behalf of aliens on the *Application for Alien Employment Certification* form must clearly show that:
>
> * * *
>
> (7) The employer's job opportunity's terms, conditions and occupational environment are not contrary to Federal, State or local law.

20 C.F.R. §656.20(c)(7).

As stated in its Motion, Employer's willingness to pay 1 ½ times the basic rate complies with applicable Federal, State, and local employment laws, and, the "mere fact that the employer chooses not to permit its employees to work overtime, is not contrary to any laws or regulations." (AF 3). Accordingly, we deem it is necessary to order a remand.

ORDER

For the reasons stated, the denial of certification is **VACATED**, and this case is **REMANDED** to the Certifying Officer for further proceedings consistent with this Decision.

For the Panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.